ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ILLINOIS.[2]

COURT OF ERRORS AND APPEALS OF MARYLAND.

SUPREME COURT OF MICHIGAN.[4]

SUPREME COURT OF MISSOURI.[5]

SUPREME COURT OF NEW JERSEY.[6]

ACCOUNT. See *Equity.*

ACTION.

Breach of Promise—Incapacity to Contract.—A promise to marry made by a person physically and incurably impotent is contrary to the statutory policy of the state, and its breach will not constitute a cause of action: *Gulick* v. *Gulick*, 12 Vroom.

ADMINISTRATOR.

Bill by, to remove Cloud.—An administrator, taking neither an estate, title nor interest in the lands of his intestate, cannot maintain a bill to remove a cloud from such lands. He takes a mere power to sell to pay debts of the intestate, and if he sells for that purpose, he must take the land as he finds it: *Ryan* v. *Duncan*, 88 Ills.

AGENT

When Principal Bound.—Where a son is suffered to act as a general agent for his father, both in buying and selling articles in the father's line of business, the public will be justified in assuming that the son possessed all the powers of a general agent, in buying and selling, and the father will be liable for goods ordered by the son in his father's name, suited to his business, though the son uses them himself: *Thurber* v. *Anderson*, 88 Ills.

BILL OF EXCEPTIONS.

Presentment After the Term.—A bill of exceptions, filed after the term, will not be considered, unless it appears by an entry of record that the opposing party consented to the filing. An entry showing merely that he was present when the court gave the appellant leave to file it out of time, is not sufficient; nor will the defect be cured by an entry subsequently made by the clerk, in vacation, reciting that consent was given: *State* v. *Duckworth*, 68 Mo.

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[2] From Hon. N. L. Freeman, Reporter; to appear in 88 Ills. Reports.

[3] From J. Shaaf Stockett, Esq., Reporter; to appear in 48 Maryland Reports.

[4] From H. A. Chaney, Esq., Reporter; to appear in 40 Michigan Reports.

[5] From T. K. Skinker, Esq., Reporter; to appear in 68 Missouri Reports.

[6] From G. D. W. Vroom, Esq., Reporter; to appear in vol. 12 of his reports.

BILLS AND NOTES. See *Evidence.*

Endorsement of Waiver of Protest.—The endorsement by the payee of a promissory note, that he holds himself "responsible for the within note, without notice or protest," is of no other effect than to waive protest and notice as a necessary step to fix his liability in case the drawer fails to pay the note at maturity: *Halley* v. *Jackson*, 48 Md.

The liability of the maker and endorser of such note is several, and it is error to proceed against them as if they were jointly bound: *Id.*

CONSTITUTIONAL LAW. See *Limitations, Statute of; Municipal Corporation*

COURTS.

Jurisdiction.—Illegality in the service of process by which jurisdiction is to be obtained, is not waived by the special appearance of defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits. Objection to the illegal service is considered as abandoned, only when the party pleads to the merits in the first instance, without insisting upon the illegality: *Harkness* v. *Hyde*, S. C. U. S., Oct. Term 1878.

CRIMINAL LAW.

Accomplice — Testifying in behalf of the State.—Where an accomplice is convicted after having been made a witness by the state, and received as such by the court, and after having made an ingenuous confession, such accomplice has an equitable claim to a judicial recommendation to the mercy of the pardoning power, which cannot be withheld without a violation of an established rule of practice: *State* v. *Graham*, 12 Vroom.

It is competent for the court to order the accomplice to be acquitted at the trial, for the purpose of qualifying him as a witness for the state, or to accept from the defendant a plea admitting guilt to such a degree as, in the opinion of the court, is requisite; or for the court to assent to the entering of a *nolle prosequi* by the attorney-general: *Id.*

Forgery of Municipal Obligations—Elements of the Crime.—It is not essential to the crime of forgery, that the person in whose name the instrument purports to be made, shall have legal capacity to make it. It is sufficient, under Wag. Stat., sect. 16, p. 470, if it is made with intent to defraud, and on its face would be likely to defraud. Thus, the making a false municipal certificate of indebtedness, with intent to injure or defraud, is forgery, notwithstanding the municipality may have no power to issue such certificates: *State* v. *Eades*, 68 Mo.

Indictable Nuisance.—A house in which unlawful sales of liquor are habitually made, is an indictable nuisance, although there is a city ordinance prescribing the penalties for such sales, as such traffic is not only a breach of the city law, but also of the statutory policy of the state: *Meyer* v. *State*, 12 Vroom.

Obtaining Goods under False Pretences.—An indictment for obtaining a stock of goods in exchange for a tract of land under false pretences, charged that defendant *designedly*, feloniously and falsely pretended that

he was the owner of the land, and averred that in truth and in fact he was not the owner; but did not charge that he knew he was not the owner. *Held*, that this was a fatal defect; the *scienter* should have been expressly averred; the use of the word "designedly" did not dispense with it: *State* v. *Bradley*, 68 Mo.

The indictment also charged that defendant pretended that he had an abstract which showed a perfect title in himself; but there was no averment that he did not have such an abstract. *Held*, that the absence of this averment was fatal, and the defect was not supplied by an averment that defendant well knew the abstract to be imperfect, and untrue in showing that he had title. If such was the fact, the abstract should have been set out as a false token or writing, and the defendant should have been charged with designedly, feloniously and falsely pretending that it was a true abstract, and correctly represented the title to be in him; and this charge should have been accompanied by a proper negative and an averment of the *scienter*: *Id.*

DAMAGES. See *Frauds, Statute of; Officer.*

DEED.

Reformation of—Equity.—Where the terms of a deed are agreed upon and the parties go to a conveyancer and state such terms to enable him to draft the deed, and the grantor, afterwards, without the knowledge of the grantee, gives other directions as to the terms to be inserted, which are followed, and the grantee accepts the deed, supposing it to be drawn as agreed upon, a court of equity will reform the deed, the proceeding being a fraud upon the grantee: *Berger* v. *Ebey*, 88 Ills.

EASEMENT. See *Lateral Support.*

EQUITY. See *Receiver.*

Account—Laches.—In matters of account, more especially, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy—from the difficulty of doing entire justice between the parties (which as a court of conscience it is bound to do), where the transactions have become obscure by time, and the evidence may be lost: *Hall, Adm'r*, v. *Clagett*, 48 Md.

Lapse of time may operate as a bar to a decree to account. In equity *laches* and neglect are discountenanced. Stale demands without an effort to enforce them, cannot invoke the aid of a tribunal which only lends its power to reasonable diligence.

EVIDENCE. See *Trial.*

Bills and Notes—Judicial Notice of Time.—An averment that a note, dated August 12th 1872, at four months, was presented for payment, December 14th 1872, is sufficient to show a presentment at the proper time, because the court will take judicial notice, not only of the law-merchant, but also of the almanac, from which it appears that the 15th of December 1872 fell on a Sunday: *Reed* v. *Wilson*, 12 Vroom.

It must be presumed that the three days of grace allowed by the general law-merchant are also allowed by the law of Pennsylvania, where the note was payable: *Id.*

Usage—Judicial Notice of Laws of Former Government.—The common usage of any country in reference to its measures should be followed in estimating such measures when referred to in grants made there: *United States* v. *Askew*, S. C. U. S., Oct. Term 1878.

The courts of the United States take judicial notice of the laws which formerly prevailed in countries acquired by the United States, up to the time of such acquisition. As to such countries, they are not deemed foreign laws, but the laws of an antecedent government: *Id.*

The true Mexican vara is slightly less than 33 American inches, but by use in California, it is estimated at 33 inches, and in Texas at 33⅓ inches: *Id.*

Forcible Entry and Detainer.

Parties Defendant—Agent.—A writ of restitution in an action of forcible entry and detainer, will not necessarily be unavailing because the persons who were living upon the land at the institution of the suit were not made defendants. If they were the servants of the person who was made defendant, they can be dispossessed under the writ; and the fact that defendant does not live in the county where the land lies, does not alter the case; *DeGraw* v. *Prior*, 68 Mo.

Frauds, Statute of.

Promise to Pay for Services rendered to Another.—Where after three visits made by a physician to a son-in-law of the defendant, the latter undertook to be responsible for the payment for the services of the former, and services were subsequently rendered under this promise, the defendant's promise is an original undertaking as to the subsequent visits, and he is liable for the reasonable value of such services, but not for services rendered before his undertaking: *King* v. *Edmiston*, 88 Ills.

Verbal Promise to Pay the Debt of Another—Damages.—A verbal promise to pay the debt of another is within the Statute of Frauds, and void if made to the creditor; but not if made to the debtor: *Pratt* v. *Bates*, 40 Mich.

A man promised certain stockholders to pay the debts of the corporation, in consideration of which they transferred some of their stock to him. They were not liable themselves, and were interested only as stockholders. Failing to pay a certain debt he was sued in assumpsit by the creditor upon an assignment of this agreement. *Held*, that the action did not lie, since nothing was assigned but the damages resulting to the stockholders from the non-payment of that one debt, and their interest could not be ascertained in a court of common law, nor severed from the entire transaction: *Id.*

The measure of damages for failure to pay the joint obligations of others, is the whole amount of the debts: *Id.*

Homestead.

Abandonment.—Where a mortgagor abandons his homestead, it is immaterial whether he knew or was ignorant of the fact that the mortgage contained a clause releasing it, at the time he executed the same, or whether his wife signed or acknowledged the same; the mortgage will thereby be rendered operative as to the homestead: *Cobb* v. *Smith*, 88 Ills.

INJUNCTION.

When Order for, is same as the Writ.—Where the defendant in a bill is present when an order for a writ of injunction is granted, and has full notice thereof, he is bound to observe it, the same as if the writ were issued, or be in contempt; and on dismissal of the bill, thereby removing the restraining order, damages may be properly assessed: *Danville Banking and Trust Co.* v. *Parks*, 88 Ills.

INSURANCE.

Liability of Agent for Premiums taken after Company has been excluded from the State.—An agent of an insurance company, who issues a policy and takes the premium after the company's certificate of authority to do business in this state has been revoked by the superintendent of the insurance department, is liable to return the premium, notwithstanding he was not, at the time, aware of the revocation, and the four weeks' notice of revocation required by Wag. Stat., sect. 32, p. 772, has not been given by the superintendent: *McCutcheon* v. *Rivers*, 68 Mo.

Meaning of "Legal Heirs" in Policy.—A policy of life insurance, payable to the "legal heirs" of the person whose life is insured, when he leaves children at his death, is payable to them. His widow in such case is not included in the words as an heir: *Gauch* v. *St. Louis Mutual Life Ins. Co.*, 88 Ill.

INTERNATIONAL LAW.

The division of an empire does not of itself destroy rights of property held by the citizens of its different parts, though situated in a different division from that in which they may reside: *Airhart* v. *DeMessieu et al.*, S. C. U. S., Oct. Term 1878.

A citizen of Mexico was not divested of his title to lands in Texas by the revolution, nor by the constitution or laws subsequently adopted; but retained the right to alienate the same, and to transmit the same to his heirs, being also citizens of Mexico, and such heirs are entitled to sue for and recover such lands in the courts of Texas: *Id.*

JUDGMENT.

Time when Lien Attaches.—A judgment has relation to the time when it is entered up. It will not affect any *bona fide* conveyance, made for value before that time, for it only attaches upon that which is then, or afterwards becomes the property of the debtor; and if the property be charged in equity before the entry of the judgment, the judgment will not affect such charge: *Dyson* v. *Simmons*, 48 Md.

JURY. See *Trial.*

LACHES. See *Equity.*

LATERAL SUPPORT.

Right of—Restriction.—Every landowner has a right to have his land preserved unbroken, and an adjoining owner excavating on his own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. But this right of lateral

support extends only to the soil in its natural condition. It does not protect whatever is placed upon the soil increasing the downward and lateral pressure. If it did it would put it in the power of a lotowner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter: *Northern Transportation Co.* v. *Chicago*, S. C. U. S., Oct. Term 1878.

Limitations, Statute of.

Defence under is a Vested Right.—When a right of action has become barred under a Statute of Limitation, the statutory defence is a vested right, that cannot be impaired by subsequent legislation: *Ryder* v. *Wilson's Executors*, 12 Vroom.

In the administration of a decedent's estate, the expiration of the time for the creditors to present their claims, worked, under the old law, a bar to claims not presented. *Held*, that the repeal of the law authorizing this procedure, did not revive the right to enforce, against the personal representative, such unpresented claims: *Id.*

The rule and the fact that the claim sued on was not presented within the time limited, may be pleaded as a bar: *Id.*

Malicious Prosecution.

Termination of Prosecution.—In an action for malicious prosecution, the plaintiff must show that the prosecution or proceeding of which he complains, is legally at an end, and that it was instituted maliciously and without probable cause: *Potter* v. *Casterline*, 12 Vroom.

The legal termination of the prosecution is sufficiently shown by the refusal of the grand jury to find a bill, without a formal order of discharge by the court: *Id.*

A rejection of the complaint by the grand jury is *prima facie* evidence of want of probable cause: *Id.*

There is no error in refusing to non-suit, if, from the facts proved, the jury might infer that the defendant had no actual belief or suspicion of the plaintiff's guilt: *Id.*

A defendant in such an action cannot excuse himself by showing that he acted under the advice of an unprofessional person: *Id.*

Marriage. See *Action.*

Mortgage. See *Homestead.*

Equitable Mortgage—Enforcement in Equity of a Defective Mortgage.—If a party makes a mortgage or affects to make one, but it proves to be defective, by reason of some informality or omission, such as failure to record in due time, defective acknowledgment or the like, though even by the omission of the mortgagee himself, as the instrument is at least evidence of an agreement to convey, the conscience of the mortgagor is bound and it will be enforced by a court of equity, not only as against the mortgagor, but as against judgment-creditors of the mortgagor obtaining their judgments subsequent to the date of the mortgage, except where this principle has been modified by statute: *Dyson* v. *Simmons*, 48 Md.

Removal of Building.—A mortgagor, while he has the right to use

the mortgaged premises, has none to commit waste, or to remove buildings therefrom, or to do any other act impairing the security; and the removal of a house from the premises may be enjoined in equity, or if it has been severed without the consent of the mortgagee, he may maintain replevin at any time before it becomes attached to and forms a part of other realty: *Dorr* v. *Dudderar*, 88 Ills.

Municipal Corporations.

Police Power—Nuisance.—The legislature may for police purposes, prescribe the limits of municipal bodies, enlarging or contracting them at pleasure, and give them power to pass ordinances, to prevent nuisances, to operate beyond their boundaries: *Chicago Packing and Provision Co.* v. *Chicago*, 88 Ills.

Assessment of Benefits for Improvements—Constitutional Law.—The legislature has the constitutional power to authorize benefits to be assessed and levied by the Mayor and City Council of Baltimore, upon property adjacent to, as well as within the limits of, the city: *Brooks* v. *Mayor of Baltimore*, 48 Md.

Such assessment is not a tax for the support of the municipal government, but a contribution from persons, whose property has been increased in value by the opening and widening of the street in question, at least in an amount equal to the sum they were required to pay: *Id.*

Taxes and special assessments for benefits stand upon widely different grounds, and the distinction between them has been so generally recognised, that it must now be considered as settled: *Id.*

Nuisance. See *Criminal Law.*

Acts done under Authority of Law.—That cannot be a nuisance such as to give a common-law right of action, which the law authorizes: *Northern Transportation Co.* v. *Chicago*, S. C. U. S., Oct. Term 1878.

A legislature may and often does authorize and even direct acts to be done, which are harmful to individuals, and which without authority would be nuisances, but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful and are not nuisances, unless the power has been exceeded: *Id.*

In such grants of power, a right to compensation for consequential injuries caused by the authorized erections, may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it: *Id.*

Where a tunnel was authorized to be constructed by an act of the legislature of the state, and directed by an ordinance of the city councils: *Held*, that the city was not liable for consequential damages to adjoining owners; *Id*

Persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill: *Id.*

Officer.

Becoming a Trespasser, by Exceeding his Authority.—An officer has no authority for threshing wheat he has levied upon in the mow, before selling it: *Stilson* v. *Gibbs*, 40 Mich.

An officer who is sued on the ground that he exceeded his authority, is not to be presumed to have been justified by extraordinary circumstances, but has the burden of showing the necessity of his action: *Id.*

Where an officer, by abuse of his authority, renders himself technically liable as trespasser *ab initio*, and is sued therefor, the jury may nevertheless in their discretion limit the award of damages to the plaintiff's actual injury: *Id.*

If an officer with an execution misuses the property levied upon, he is liable to the execution-debtor therefor, and possibly to the creditor also, if the sale on the execution fails to satisfy the judgment: *Id.*

PARTNERSHIP.

Dissolution—Distribution of Assets—Equity.—As long as the debts of a partnership are outstanding, it is irregular to undertake to distribute any assets thereof amongst the partners. The right of any partner or his representative extends only to his share of any surplus, after all of the liabilities of the firm have been discharged. It is the duty of each partner to aid in the final settlement of the business of the firm. If the firm have been finally dissolved, this duty of the partners would still continue; it had to be wound up, their assets if any, applied to the discharge of their liabilities—steps taken to recover any effects belonging to the partnership; receipts, acquittances or discharges given and a final ascertainment of the condition of the firm: *Hall, Adm'r* v. *Clagett*, 48 Md.

The powers of the partners were co-ordinate, whether the partnership was in active operation, or subsisted only for the purpose of winding up the affairs thereof, and it was the duty of each partner to keep precise accounts of all his own transactions for the firm, and to have them at all times ready for inspection: *Id.*

If there have been a total failure to do this, it affords a good reason for a court of equity to decline to supply them, without a sufficient reason or excuse for the omission: *Id.*

A court of equity will not grope its way in utter darkness and undertake to create and establish a claim upon mere contingencies, or the preponderance of mere possibilities or probabilities. There is no duty devolving on it to assume the impracticable task of adjusting the relative rights of partners, when the proof is utterly deficient and inconclusive: *Id.*

Disssolution by Death—Surviving Partners.—A firm is dissolved by the death of a partner: *Jenness* v. *Carleton*, 40 Mich.

A surviving partner cannot bind co-survivors by signing the firm name, without their express authority or ratification; *Id.*

PATENT. See *United States Courts.*

PLEADING.

Declaring upon Express Contract between Other Parties.—A plaintiff declaring specially upon an express contract between third persons alone, must aver his title and then make out by evidence the same contract as that set forth in his declaration, and his right and title as alleged: *Rose* v. *Jackson*, 40 Mich.

The right to sue upon a contract as assignee, must be positively

averred, and an allegation of the assignment in the consolidated common counts will not support a recovery upon a special count in which it is not averred. Nor would a mere additional allusion to the assignment in the special count be sufficient: *Id.*

Possession.

When adverse.—If one takes possession of the land of another, believing and claiming it to be his own, his possession is adverse. It is only where he occupies by mistake and with no intention of claiming any thing which does not belong to him, that it is not adverse: *Walbrunn* v. *Ballen*, 68 Mo.

A proposal from one in the possession of land to buy out the holder of the true title, does not necessarily amount to a recognition of this title, or an acknowledgment that the possession is not adverse: *Id.*

Receiver.

Power to Sue in another State.—A receiver appointed in a foreign jurisdiction, clothed with authority to take the designated property, wherever situate, may sustain a suit for such property in the courts of this state: *Hurd* v. *Elizabeth*, 12 Vroom.

This is the rule whenever the creditors of the person represented by the receiver do not intervene: *Id.*

Sale.

Agreement that Title not to pass—Sale by Vendee.—If a party buys corn under an agreement, that if it does not prove to be of grade No. 2, in the place to which it is to be shipped, the title is not to pass, but it shall be subject to the disposal of the vendor, and such purchaser through his agent, sells the same after it is inspected and rejected as No. 2, he will be liable for the price received by him to the vendor: *Burns* v. *Mays*, 88 Ills.

Specific Performance.

Control of Equity over Contracts—Demand for Performance.—Stipulations not actually made and to which the parties might not have assented, cannot be imported into a contract, however equitable they may be: *Nims* v. *Vaugh*, 40 Mich.

Where a demand for specific performance has once been made and refused, it is not necessary to repeat it under similar circumstances before suing to compel it: *Id.*

A decree in chancery is no bar to a suit that does not involve the same questions, even though they might have been brought into the first case by a cross-bill, but were not: *Id.*

Specific performance will not be refused as inequitable because of the fluctuation of values, where the court has no means of knowing what bearing the contract had on the negotiations of the parties: *Id.*

Statute.

Exemption from Taxation.—A statute exempting property from levy and sale, is not to be construed strictly, but so as to carry out the obvious intention of the legislature: *Washburn* v. *Goodheart*, 88 Ills.

Where property is exempt from execution, the debtor may sell, mort-

gage or pledge it as he pleases, without making it liable to levy and sale under execution: *Id.*

TAXATION. See *Municipal Corporation; Statute.*

TRIAL.

Scintilla of Evidence—Questions for the Jury.—Where there is only a *scintilla* of evidence on any essential fact the case should be taken from the jury: *Conely* v. *McDonald*, 40 Mich.

Where the evidence has a legal tendency to make out a proper case in all its parts, its weight and sufficiency, however slight, is a question for the jury alone: *Id.*

Where a jury's finding of an essential fact is wholly unsupported by evidence, it is erroneous as matter of law, but where it is supported by any evidence, however slight, it is a finding of fact and cannot be reviewed on writ of error: *Id.*

TRUST AND TRUSTEE.

Purchaser on foreclosure made Trustee for the benefit of a prior Grantee whose rights should have been protected.—Contracting parties must not act in bad faith to third persons who are in such relations to either as to be affected by their agreement or its consequences: *Huxley* v. *Rice*, 40 Mich.

A transaction that is in fraud of one's rights may be construed in equity so as to be a means of saving and protecting them: *Id.*

Where a conveyance is obtained for fraudulent ends or under oppressive circumstances, the party deriving title is converted into a trustee, if necessary, for administering relief: *Id.*

One who has sold mortgaged land with warranty and has covenanted to pay off the mortgage, cannot make title in himself as against his grantee by allowing foreclosure and redeeming the land: *Id.*

K. sold to H. a parcel out of a lot which he had mortgaged and then allowed the mortgage to be foreclosed upon the whole lot, and by a collusive arrangement with R. in his own interest but in fraud of H.'s rights, the lot was bid in by R., who then refused to release to H. except upon terms. *Held*, that R. should be considered as holding H.'s parcel as trustee for H.'s benefit, and so far as H. was concerned, as K.'s mortgagee: *Id.*

Revocation.—Where a party makes another trustee of notes endorsed and delivered by her to him, not only for her own benefit, but also for the benefit of the makers of the notes, the trustee being one, she cannot revoke the same, nor will a court of equity revoke the same, where no abuse of the trust is shown: *Light* v. *Scott*, 88 Ills.

UNITED STATES COURTS.

Suits between Citizens of the same State about Patents.—A suit between citizens of the same state cannot be sustained in a Circuit Court of the United States as arising under the patent laws, where there is no denial of the validity of the plaintiff's patent, where its use is admitted, and where a subsisting contract is shown governing the rights of the parties in the use of the invention: *Hartell et al.* v. *Tilghman*, S. C. U. S., Oct. Term 1878.

Relief in such an action is founded on the contract, and not on the patent laws of the United States: *Id.*